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3 UNITED STATES DISTRICT COURT  
4 EASTERN DISTRICT OF WASHINGTON  
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6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 vs.

9 JAMES ANTHONY STINSON,

10 Defendant.  
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)  
) No. CR-12-0040-JLQ

) MEMORANDUM RE:  
) SENTENCING ISSUES

12 On November 5, 2012, counsel for the Defendant filed pleadings concerning the  
13 draft Presentence Report including, specifically, challenges to the 4 level sentencing  
14 Offense Level enhancement pursuant to U.S.S.G. 2K2.1(b)(6)(B). Counsel for the  
15 Defendant addressed that issue and cited cases allegedly supporting his position.

16 On November 7, 2012, the Government filed its Sentencing Memorandum which  
17 failed to address the sentencing enhancement issued raised by the Defendant. Because  
18 of the imminency of the scheduled sentencing hearing on November 13, 2012, the  
19 Government's failure has required the undersigned to personally set aside other pressing  
20 matters in this and other districts, and perform research which apparently has not, as  
21 yet, been done by the Government.

22 U.S.S.G. 2K2.1(b)(6)(B) provides in part that:

23 If the defendant used or possessed any firearm or ammunition in connection with  
24 another felony offense; . . . increase by **4** levels. If the resulting offense level is  
less than level **18**, increase to level **18**.

25 "Another felony offense" is defined in the Application Notes to 2K2.1 as "any  
26 federal, state, or local offense, other than the explosive or firearms trafficking offense,  
27 punishable by imprisonment for a term exceeding one year, regardless of whether a

1 formal criminal charge was brought, or a conviction obtained.”

2       Reserving the issue of whether the Defendant Stinson intended to distribute to  
3 another the drugs he admittedly possessed on the date of his arrest, under the laws of the  
4 state of Washington, unlawful possession of controlled substances such as those found  
5 on the Defendant, constitutes a felony. RCW 69.50.4013. It has been determined in  
6 other federal courts that where a defendant is arrested for possession of drugs  
7 constituting a felony under state law, that felony possession alone is a predicate for the  
8 sentencing enhancement, assuming the “in connection” element is also established. See  
9 *U.S. v. Regans*, 125 F. 3d 685 (8<sup>th</sup> Cir. 1997); *U. S. v. Timbers*, 232 Fed. Appx. 820 (10<sup>th</sup>  
10 Cir. 2007; and *U.S. v. Swanson*, 610 F. 3d 1005 (8<sup>th</sup> Cir. 2010).

11       It is the court’s recollection, refreshed by reviewing the stipulated facts in the Plea  
12 Agreement, that various controlled substances were found in the Defendant’s car and in  
13 his possession at the time of his arrest. Also found was a scale and the firearm. The  
14 Defendant relies upon *Bailey v. United States*, 516 U. S. 137 (1996), where the issue was  
15 whether the evidence established that the Defendant “used” a firearm during a drug  
16 trafficking crime. Not discussed was the subsequent case of *Muscarello v. United*  
17 *States*, 524 U. S. 125 (1998) in which the Supreme Court held that the element of  
18 “carrying” a firearm during a drug trafficking crime was established by evidence that  
19 a firearm was found in a locked glove compartment. The court also notes that the case  
20 of *U.S. v. Polanco*, 93 F. 3d 555 (9<sup>th</sup> Cir. 1996), cited by the Defendant herein, found that  
21 a firearm in a vehicle utilized for drug sales was sufficient to establish the possession of  
22 a firearm during drug trafficking crimes for 2K2.1(b)(6)(B) purposes, even though the  
23 finding of the trial court that the firearm was “used” was not established.

24       This Memorandum is intended to focus the attention of counsel on the sentencing  
25 enhancement issue that will be before the court on November 13, 2012 and, hopefully,  
26 cause counsel to be prepared for the questions of the court on that matter and to perform  
27 the research necessary to address that issue.

28 ORDER - 2

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2 The Clerk shall enter this Memorandum and furnish copies to counsel.

3 Dated this 8<sup>th</sup> day of November, 2012.

4 s/ Justin L. Quackenbush  
5 JUSTIN L. QUACKENBUSH  
6 SENIOR UNITED STATES DISTRICT JUDGE  
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